③ 06052 J Cons. Review

Ms Mahapa
Committees Section
PO Box 15
Cape Town
8000

Dear Ms Mahapa

WRITTEN SUBMISSIONS ON AMENDMENTS TO CHAPTER 9 OF THE CONSTITUTION FOR THE JOINT CONSTITUTIONAL REVIEW COMMITTEE

1. Please find below, our submissions in regard to proposed amendments to Chapter 9 of the Constitution.

2. We are two female academics teaching Communications Law at the School of Law, University of the Witwatersrand ("Wits"). We are also practicing lawyers with experience in Communications Law. Khahliso Mochaba is a lecturer in Telecommunications Law in the LL.B and LL.M degrees offered at Wits. She is a candidate attorney at Knowles Husain Lindsay Inc. Justine White is the Webber Wentzel Bowens Visiting Senior Fellow in Communications Law. She lecturers on and co-ordinates the LL.M specialisation in Communications Law, including: Media Law, Broadcasting Law, Telecommunications Law and Space and Satellite Law.

3. We are making these representations in our personal capacities because we believe that an independent electronic communications regulator is an essential institution to strengthen constitutional democracy in the Republic.

4. Over the years, we have identified a number of practical problems with the provisions in Chapter 9 of the Constitution regarding the independent authority to regulate broadcasting, as provided for in section 192 of the Constitution. These problems are more fully set out in the attached draft chapter which is to be published in the June loose-leaf service of *Constitutional Law of South Africa* by Juta ("the Chapter"), which ought to be read as being part of this written submission.

5. For the reasons set out in the Chapter, the specific amendments that we believe ought to be made to Chapter 9 of the Constitution are as follows:

   (a) Section 181(1) of the Constitution ought to be amended by the insertion of a new sub-section as follows: "(g) The independent authority to regulate electronic communications.".

   (b) Section 192 of the Constitution ought to be amended to read as follows:
   "Independent Authority to Regulate Electronic Communications
   192. National legislation must establish an independent authority to regulate electronic communications in the public interest, and to ensure fairness and a diversity of views broadly representing South African society.".

   (c) Section 193 of the Constitution ought to be amended as follows:
   Section 193(1) ought to be amended by the insertion of the words "or authority" after the word "Commission"; and

Section 193(4) ought to be amended by the insertion of a new subsection (d) which is to read as follows: "(d) the independent authority to regulate electronic communications".

(d) Section 194 of the Constitution ought to be amended as follows:

Section 194(1) ought to be amended by the insertion of the words "or authority" after the word "Commission"; and

Section 194(2)(b) ought to be amended by the insertion of the words "or authority" after the word "Commission".

6. We thank you for the opportunity to make these representations and look forward to being invited to Parliament to make oral submissions thereon. Our respective addresses are:

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7. Please do not hesitate to contact us should you have any queries or require any further information. Thank you and Kind Regards,

Khahliso Mochaba and Justine White
Sent per email without signature

Section 192 of the Constitution of the Republic of South Africa Act: The Independent Broadcasting Regulator[1]

Justine White[2]

Broadcasting in the Apartheid Era:

Broadcasting in the Apartheid era was characterised by the near total monopoly of the South African Broadcasting Corporation ("the SABC") over the airwaves. Apart from the subscription television service M-Net, which carried no news, in South Africa itself radio and television broadcasting activities were carried out entirely by the SABC, in terms of the Broadcasting Act[3] ("the 1976 Broadcasting Act"). While there were certain free-to-air broadcasting services based in former TBVC[4] states that were capable of being received in parts of South Africa, including, Bop TV, Capital Radio and Radio 702, these had limited coverage areas and the majority of South Africans had no access to these services. Radio Freedom, broadcast by the African National Congress ("the ANC") from five countries in Africa was also capable of being received in South Africa[5] although it did not broadcast continuously.

In all respects during the Apartheid era, the SABC acted as a state, as opposed to a public, broadcaster. Its governing structures were under tight political control; the State President appointed the SABC Board as well as the chairman and vice-chairman[6]. As was widely suspected, the proceedings of the Truth and Reconciliation Commission have revealed that the SABC was subject to direct governmental interference in the form of the *Broederbond*[7] and internal security forces[8].

State control of the SABC was evident not only in the make up of the staff at the SABC, including in the domination of the *Broederbond* in the appointments to its Board and of its Directors General and "most top level and many other mid-level managers"[9], but also in the broadcast content; the result was that the SABC's policy "aimed at ensuring National Party ... control and white privilege"[10].

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[1] Grateful thanks to Ms Khahliso Mochaba - colleague and good friend - for her many valuable insights into the subject matter of this chapter over the years.

[2] B.A. LL.B (Wits) LL.M. (Yale). Webber Wentzel Bowens Visiting Senior Fellow in Communications Law, School of Law, University of the Witwatersrand; Director, Mukwevho Mkhabela Adekeye Inc.

[3] Act 73 of 1976.

[4] Transkei, Bophuthatswana, Ciskei and Venda.

[5] Truth and Reconciliation Commission of South Africa Report. Vol. 4. 1998. Pg 172.

[6] Sections 4(2) and 4(3) of the 1976 Broadcasting Act.

[7] TRC Report, supra note 5, at para 26.

[8] TRC Report, supra note 5, at para 25.

[9] TRC Report, supra note 5, at para 26.

[10] TRC Report, supra note 5, at para 14.

The 1976 Broadcast Acting contained very little detail as to how the SABC was to go about its broadcasting activities. Section 11(a) provided merely that one of the objects of the SABC was "to carry on a broadcasting service in the Republic". According to the TRC Report, media analysis showed that "news bulletins maintained and cultivated a mindset among white viewers that Apartheid was natural and inevitable"[11] and that SABC programming "was instrumental in cultivating a "war psychosis" which in turn created an environment in which human rights abuses could take place".[12] The TRC Report detailed confirmation of this by Major Craig Williamson who told the TRC's special hearing into the Media that "a 'special relationship' existed between the SABC and the intelligence community's units for STRATCOM. The state, he said, was at a disadvantage because it did not own/control any credible print media. It counteracted this by its use of radio and television"[13].

This programming was not aimed only at whites. Government used the SABC as a key strategic resource in both the white and black communities, to support its Apartheid policies. This evidenced by the 1976 *Broederbond* "Master Plan for a White Country" which stated that the "mass media and especially the radio will play important parts. The radio services for the respective black nations must play a giant role here"[14]. The so-called Bantu programming arm (nine radio stations and two television stations in 1984) of the SABC was also under tight political control. Of eighty-five senior employees working in these services, only six were Black.[15]

Broadcasting in Transition:

In 1990 the National Party government appointed the Viljoen Task Group to investigate the future of broadcasting and the SABC embarked on a process of internal restructuring[16]. This was met with resistance by the ANC and its allies which argued that "any restructuring of South African broadcasting could not be considered under the conditions of old-style secret deliberations by an elite white commission"[17]. One of the most important events for the restructuring of broadcasting was the Jabulani! Freedom of the Airwaves Conference[18] which took place in the Netherlands in 1991 and the recommendations coming out of the Jabulani! Conference "effectively set the terms of the public debate"[19]. These recommendations included: the need to recognise three levels of broadcasting: public, commercial and community; that the public service broadcaster had to cater for all tastes and be independent

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[11] Op Cit. Note 5 at pg 168.
[12] Op Cit. Note 5 at pg 168.
[13] TRC Report, note 5 para 25.
[14] TRC Report, note 5 para 28.
[15] TRC Report, note 5 para 27.
[16] Horwitz, *Communication and Democratic Reform in South Africa*, Cambridge University Press, 2001. At pg 126/7.
[17] Op Cit. Note 16 at pg 129.
[18] Hosted largely under the auspices of the Campaign for Open Media.
[19] Op Cit. Note 16 at pg 133.

of government; all South African indigenous languages had to have access to broadcasting and that education was to be a broadcasting priority.[20]

In 1993, the political groupings represented at the Kempton Park negotiations on South Africa's future constitutional dispensation agreed on more than the provisions of the Constitution of the Republic of South Africa Act[21] ("the Interim Constitution"). They also agreed on two other pieces of legislation that, together with the Interim Constitution, were critical to ensuring that the transition from Apartheid to democracy took place. These Acts were the Local Government Transition Act[22] and the Independent Broadcasting Authority Act[23] ("the IBA Act").

Broadcasting had been included on the agenda of the CODESA negotiations. "Broadcasting was placed within the terms of reference of CODESA working group 1, Subgroup 3, which was mandated to examine the creation of "a climate and opportunity for free political participation, including the political neutrality of and fair access to, the state controlled media"[24]. The CODESA and later the Kempton Park negotiators wanted to ensure that the broadcasting regime in a post-apartheid South Africa would be entirely different to that pertaining under the National Party government. The result was the passage of the IBA Act.

The IBA Act has been described by commentators as a "radical piece of legislation"[25]. It introduced a number of key changes to the broadcasting environment, including:

- introducing a three tier broadcasting system composed of community[26], commercial[27] and public broadcasting[28];
- introducing a competitive commercial broadcasting sector with limitations on the number of licences a single person could control[29] and on the levels of foreign ownership[30];
- prohibiting party political control of broadcasters[31];
- introducing various categories of signal distribution licences[32], that is, licences for the distribution of signals for broadcasting purposes;
- requiring local content quotas for both radio and television[33]; and

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[20] Op Cit. Note 16 at pg 133.
[21] Act 200 of 1993.
[22] Act 209 of 1993.
[23] Act 153 of 1993.
[24] Op Cit. Note 16 at pg 139.
[25] Op Cit. Note 16 at pg 145.
[26] Section 47 of the IBA Act.
[27] Section 46 of the IBA Act.
[28] Section 45 of the IBA Act.
[29] Sections 49 and 50 of the IBA Act.
[30] Section 48 of the IBA Act.
[31] Section 51 of the IBA Act.
[32] Chapter V of the IBA Act.
[33] Section 53 of the IBA Act.

- creating an independent regulator to regulate broadcasting in the public interest – the Independent Broadcasting Authority ("the IBA")[34].

Restructuring broadcasting was seen by all political groupings as essential to the success of the 1994 elections in which, simply put, a party with mass support but no access to political power, the ANC, was competing against a party with very little mass support but almost total political control, the National Party. Both parties were anxious about the relative strengths of the other and perceived that the other (one at that time and the other in future) might interfere with the SABC for political gain as had been the pattern during the Apartheid era.

The Interim Constitution

Later in 1993 the provisions of the Interim Constitution were also finally hammered out by the negotiating parties at Kempton Park. It too dealt with the regulation of broadcasting, in the freedom of expression clause. Section 15(2) of the Interim Constitution provided: "All media financed by or under the control of the state shall be regulated in a manner which ensures impartiality and the expression of a diversity of opinion". There are three interesting aspects of this subsection:

First, it concerns itself only with "media financed by and under the control of the state". This is provision underscores the centrality of the political debates on the future role of the SABC that were taking place at the time that the Interim Constitution was being drafted.

Second, the sub-section requires that regulation ensure, in effect, that the media financed by or under the control of the state be impartial and express a diversity of opinion. Impartiality and a diversity of opinion were two characteristics of the SABC that the TRC would later find to have been lacking in its broadcasts, particularly in respect of news and current affairs programming[35].

Third, the sub-section gives no indication as to what kind of media regulator is required or whether a separate and independent media regulator is even required. All it provides is that state media "be regulated in such a manner as to ensure impartiality and the expression of a diversity of opinion." The Interim Constitution is silent as to how that regulation is to take place.

However, this provision of the Interim Constitution was never the subject of litigation so no court had the opportunity to pronounce upon its meaning.

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[34] The now-repealed section 3 of the IBA Act.
[35] Op Cit. Note 5 at para 22.

No mention of the regulation of the broadcast media was made in Schedule 4 to the Interim Constitution. This schedule set out the Constitutional Principles that the Constitutional Court would measure the final Constitution's compliance with, before certifying it[36].

Section 192 of the Constitution: General

It is significant that the Constitution of the Republic of South Africa Act[37] ("the Constitution") specifically requires the independent regulation of broadcasting. Section 192 of the Constitution provides: "National legislation must establish an independent authority to regulate broadcasting in the public interest, and to ensure fairness and a diversity of views broadly representing South African society". Section 192 is situated in Chapter 9 of the Constitution, which is titled "State Institutions Supporting Constitutional Democracy".

There are a number of aspects of section 192 that require comment and elucidation as section 192 is worded very differently from its predecessor in section 15(2) in the Interim Constitution.

First, section 192 concerns itself with all broadcasting - not only with "media financed by or under the control of the state", as was the case in section 15(2) in the Interim Constitution. Thus all broadcasters, including commercial and community ones, and not just the SABC, are affected by the provisions of section 192.

Second, section 192 explicitly requires that national legislation establish an independent authority to regulate broadcasting. This is very different from the provisions of section 15(2) of the Interim Constitution which required only that media financed by or under the control of the state "be regulated" but gave no indication as to how this should be done. There are two key aspects to this, namely, that national legislation is required to address the issue of the regulation of broadcasting and that such legislation establish an independent regulator to regulate broadcasting.

Third, section 192 gives content as to what the role of the independent regulator is, namely, to regulate broadcasting "in the public interest, and to ensure fairness and a diversity of views broadly representing South African society". Again it is important to note that these requirements apply to all broadcasting and not simply to broadcasters financed by or under the control of the state.

It is clear that the framers of the Constitution were of the view that independent regulation of broadcasting was a necessary element of constitutional democracy and that was necessary in

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[36] Section 71 of the Interim Constitution.
[37] Act 108 of 1996.

order to ensue that the public interest in broadcasting was met and also to ensure fairness and a diversity of views.

Other so-called "Chapter 9 institutions" include, among others, the Public Protector, the South African Human Rights Commission and the Electoral Commission. An anomaly exists in respect of the independent authority to regulate broadcasting provided for in section 192 of the Constitution as the authority to regulate broadcasting is not mentioned in the general provisions in Chapter 9 that are applicable to all other Chapter 9 bodies, such as sections 181, 193 and 194 of the Constitution.

Section 181 is headed "State Institutions Supporting Constitutional Democracy" and subsection (1) provides that the "following state institutions strengthen constitutional democracy in the Republic" and then goes on to list every institution provided for in Chapter 9 of the Constitution except for the independent authority to regulate broadcasting. Subsection (2) provides that these institutions are "independent, and subject only to the Constitution and the law, and they be impartial and must exercise their powers and perform their functions without fear, favour or prejudice". Subsection (3) provides: " Other organs of state, through legislative and other measures, must assist and protect these institutions to ensure the independence, impartiality, dignity and effectiveness of these institutions". Subsection (4) provides: "No person or organ of state may interfere with the functioning of these institutions."

Sections 193 and 194 deal with, respectively, appointment and removal procedures. Again, section 193 refers specifically to every institution established by Chapter 9 except for the independent authority to regulate broadcasting. Section 193(4) requires that the President, on the recommendation of the National Assembly, appoint the Public Protector, the Auditor-General and the members of the South African Human Rights Commission, the Commission for Gender Equality and of the Independent Electoral Commission. Section 193(5) requires that the National Assembly recommend people nominated by a committee of the Assembly composed of all members of the parties represented in the Assembly[38] and approved by the Assembly by a resolution which must be adopted by with a supporting vote of at least 60% of the members in respect of a resolution regarding the appointment of the Public Protector or the Auditor General[39] and of a majority of the members in respect of a resolution regarding the appointment of a member of a Commission[40]. However, the section is silent on the process that is to be followed in respect of the appointment of the members of the independent authority to regulate broadcasting. Similarly, section 194 deals with how the Public Protector, Auditor-General or a member of a Commission established by Chapter 9 may be removed from office, namely, only on the grounds of misconduct, incapacity or incompetence, a finding to this effect by a committee of the National Assembly and the

[38] Section 193(5)(a) of the Constitution.
[39] Section 193(5)(b)(i) of the Constitution.

adoption by the National Assembly of a resolution calling for that person's removal from office[41] which must be carried out by the President[42], but makes no mention of the independent authority to regulate broadcasting.

Given the fact that section 181, 193 and 194 of the Constitution do not mention the independent authority to regulate broadcasting, it is not certain whether or not these sections apply to it. It is clear from the public hearings that took place before the Parliamentary Portfolio Committee on Communications ("the Portfolio Committee") in 2000 on the Bill that became the Independent Communications Authority of South Africa Act[43] ("the ICASA Act"), that many interested parties believed that they did apply to it.[44] However, informal comments by certain members of the Portfolio Committee appeared to indicate that at least certain members of the ANC held the view that the only constitutional protection afforded to the independent authority to regulate broadcasting was section 192 itself and that the provisions of sections 181, 193 and 194 are not required to be complied with in any dealings with the authority. In any event, certain critical amendments that were made to the ICASA Bill by the Portfolio Committee resulted in the ICASA Act complying with sections 193 and 194 in respect of the appointment and removal of ICASA councillors whereas the original provisions of the ICASA Bill "tried...to give the powers of appointment and removal of councillors to the [E]xecutive"[45].

There is no general interpretation clause in the Constitution. Section 39 deals with interpreting the Bill of Rights only. The Interpretation Act[46] does not aid in dealing with independent authority to regulate broadcasting as its provisions do not apply directly to the peculiar position that the broadcasting authority finds itself in in Chapter 9 of the Constitution. Obviously the literal rule of interpretation[47] dictates that sections 181, 193 and 194 of the Constitution do not apply to the independent authority to regulate broadcasting because "the words of the statute must be interpreted in their ordinary, literal meaning"[48]. Therefore, as section 181 refers by name to every body established in terms of Chapter 9 except for the authority to regulate broadcasting and because sections 193 and 194 refer to Commissions (as opposed to using a broader term such as bodies) established by Chapter 9 and to the

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[40] Section 193(5)(b)(ii) of the Constitution.
[41] Adopted with a supporting vote of at least two thirds of the members of the Assembly in the case of a resolution concerning the removal from office of the Public Protector or the Auditor-General in terms of section 194(2)(a) or of a majority of the members of the Assembly in the case of a resolution concerning the removal from office of the members of a Commission section 194(2)(b) of the Constitution.
[42] Section 194(3)(b) of the Constitution.
[43] Act 13 of 2000.
[44] See, for example, the public submissions by the National Association of Broadcasters.
[45] Tracy Cohen "SA Telecommunications and the Impact of Regulation" Journal of African Law 47, 1, (2003) 67 at pg 80.
[46] Act 33 of 1957.
[47] See generally Interpretation of Statutes. 3 Ed. G.M. Cockram. Juta. 1993. Pg 36ff.
[48] Op cit. Note 47.

Auditor-General and the Public Protector, these sections do not apply to the independent authority to regulate broadcasting. However, there are a number of other theories of statutory interpretation which would lead one to a different result. For example, in accordance with the mischief rule, a "court may have regard to 'the mischief' that the Act was designed to remedy"[49]. Thus "the court may look not only at the language of a statute, but also at 'the surrounding circumstances, and may consider its objects, mischiefs, and its consequences'"[50]. However, this rule applies only in respect of ambiguity[51], and it is arguable that sections 181, 193 and 194 are not ambiguous. The purposive theory of interpretation goes further: "[t]he purposive approach requires that interpretation should not depend exclusively on the literal meaning of words according to semantic and grammatical analysis"[52]. Lord Denning discusses the approach of judges in relation to the purposive approach: "when they come upon a situation which is to their minds within the spirit – but not the letter – of the legislation, they solve the problem by looking at the design and purpose of the legislation – at the effect which it was sought to achieve. They then interpret the legislation as to produce the desired effect"[53]. Clearly the purpose behind requiring that the broadcasting regulator be independent is to ensure fairness and a diversity of views, as is stated in section 192. Therefore, it is obviously preferable to read sections 181, 193 and 194 (which give content to what is meant by "independent) as applying to all Chapter 9 institutions including the only one not specifically referred to in those sections, in order to bolster the independence of the broadcasting authority.

Bolstering the independence of the regulator is important for a number of reasons. First, given the history of abuse in respect of government interference in broadcasting, having an independent authority to regulate broadcasting is essential to make a decisive break with the past. Second, given high illiteracy rates in South Africa, a significant number of South Africans rely on broadcasting to meet all of their news and information needs. Independent regulation is critical to ensuring that broadcasting will meet these needs effectively. Third, the authority to regulate broadcasting is required to fulfil the crucial and on-going role of regulating broadcasting in the public interest. Consequently the issue of the independence of the broadcasting regulator is of vital and lasting concern to our democracy if South Africa is to ensure genuine fairness and access to a diversity of views in broadcasting.

Indeed, even if the courts decide not to read sections 181, 193 and 194 of the Constitution as applying directly to the independent authority to regulate broadcasting, these sections will arguably play an important role in determining whether legislation does indeed provide for the kind of independent authority required by section 192. Questions concerning the appointment

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[49] Op cit. Note 47 at pg 48.
[50] Op cit. Note 47 at pg 48 and quoting Innes CJ in *Union Government v Tonkin* 1918 AD 533.
[51] Interpretation of Satutes. G. Devenish. Juta. 1992. At pg. 36.
[52] Op Cit. Note 51.
[53] Op Cit. Note 51.

and removal procedures and the general institutional independence of the broadcasting authority would require an examination of those provisions as important indicators of the nature of the independence required by the Constitution. However, as yet no court has had occasion to comment on the meaning and ambit of section 192 of the Constitution.

It is instructive, however, to consider how the Constitutional Court has dealt with other issues relating to regulatory independence. In its so-called First Certification Judgment,[54] the Constitutional Court ruled that the text of the proposed Final Constitution, assented to by the Constitutional Assembly, did not comply with the Constitutional Principles set out in Schedule 4 to the Interim Constitution. This decision is relevant because in the event that any of the statutes regulating broadcasting was challenged,[55] a court would be required to engage in a similar process, namely, deciding whether the statute in question complies with the guarantee of independence set out in section 192 of the Constitution. The relevant aspects of the First Certification Judgment deal with the independence of certain bodies which were required to be independent by the Constitutional Principles, namely the Public Service Commission, the Reserve Bank, the Auditor General and the Public Protector. The Constitutional Court held that: "[f]actors that may be relevant to independence and impartiality, depending on the nature of the institution concerned, include provisions governing appointment, tenure and removal as well as those concerning institutional independence."[56]. The Constitutional Court found that the removal provisions in the proposed Final Constitution regarding the Public Protector and the Auditor-General did not comply with the Constitutional Principles[57]. The Constitutional Court also found that the fact that the proposed Final Constitution did not specify what the role and functions of the Public Service Commission would be and did not specify what protections it would have, meant that the Court could not certify that the Constitutional Principle requiring the establishment of an independent and impartial public service commission[58] had been met.

More recently, the Constitutional Court has commented in greater detail on the nature of the institutional independence required in respect of the Independent Electoral Commission, another Chapter 9 institution. In *New National Party of South Africa v. Government of the Republic of South Africa and Others*,[59] Langa DP[60] (as he was then) made some important statements on the general nature of the institutional independence of the Electoral

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[54] *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC).
[55] These would include, *inter alia*, the IBA Act, the ICASA Act and the Broadcasting Act, Act 4 of 1999.
[56] *First Certification Judgment*, Supra Note 54, at para 160.
[57] *First Certification Judgment*, Supra Note 54, at paras 163 and 165.
[58] *First Certification Judgment*, Supra Note 54, at para 176.
[59] 1999 (3) SA 191 (CC).
[60] In whose judgment Chaskalson P and Ackermann, Goldstone, Madala, Mokgoro, Sachs and Yacoob JJ concurred.

Commission while dealing with two particular aspects of independence, namely, financial and administrative independence:

"[Financial independence] . . . implies the ability to have access to funds reasonably required to enable the Commission to discharge the functions it is obliged to perform under the [1996] Constitution and the Electoral Commission Act. This does not mean that it can set its own budget. Parliament does that. What it does mean, however, is that Parliament must consider what is reasonably required by the Commission and deal with requests for funding rationally, in the light of other national interests. It is for Parliament, and not the Executive arm of Government, to provide for funding reasonably sufficient to enable the Commission to carry out its constitutional mandate. The Commission must, accordingly, be afforded an adequate opportunity to defend its budgetary requirements before Parliament or its relevant committees...

[Administrative Independence] implies that there will be control over those matters directly connected with the functions which the Commission has to perform under the Constitution and the Act. The Executive must provide the assistance that the Commission requires 'to ensure (its) independence, impartiality, dignity and effectiveness'. The Department [of Home Affairs] cannot tell the Commission how to conduct registration, whom to employ, and so on; but if the Commission asks the government for assistance to provide personnel to take part in the registration process, government must provide such assistance if it is able to do so. If not, the Commission must be put in funds to enable it to do what is necessary.

It follows from what I have said that the Department, the Department of State Expenditure and the Minister of Finance have failed to appreciate the true import of the requirements of the Constitution and the Electoral Commission Act which provide that the Commission be independent and subject only to the Constitution and the law, that it has the responsibility for managing elections, that it is accountable to the National Assembly and not the Executive, and that all other organs of State must assist and protect it to ensure its independence and effectiveness.[61]

The Constitutional Court has also examined the relationship between the Independent Electoral Commission, a Chapter 9 institution, and the National Government. In *Independent Electoral Commission v Langeberg Municipality*[62] the Constitutional Court, in a unanimous judgment by Yacoob J and Madlanga AJ, held that the Independent Electoral Commission is an organ of state which is not within the national sphere of government. It held that "[i]t is a contradiction in terms to regard an independent institution as part of a sphere of government

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[61] *New National Party of South Africa*. Op Cit. Note 59, at paras 98-100.
[62] 2001 (3) SA 925 (CC).

that is functionally interdependent and interrelated in relation to all other spheres of government. Furthermore, independence cannot exist in the air and it is clear that the chapter[63] intends to make a distinction between the State and government, and the independence of the Commission is intended to refer to independence from the government, whether local, provincial or national."[64] The Court went on to make some important dicta on the nature of Chapter 9 bodies more generally holding that "[o]ur Constitution has created institutions such as the Commission that perform their functions in terms of national legislation but are not subject to national executive control. The very reason the Constitution created the Commission - and other Chapter 9 bodies - was so that they should be and manifestly be seen to be outside government."[65]. It is noteworthy that the Constitutional Court did not see fit to distinguish between the independent authority to regulate broadcasting and other Chapter 9 institutions in respect of the nature of the independence these institutions enjoy.

The Constitutional Court has also handed down judgments that impact on the role of policy formulation by the Executive branch of government. In *Minister of Health and Others v Treatment Action Campaign and Others (No. 2)*[66], a unanimous court held that "where State policy is challenged as inconsistent with the Constitution, Courts have to consider whether in formulating and implementing such policy the State has given effect to Constitutional obligations, If it should hold in any given case that the Sate has failed to do so, it is obliged by the Constitution to say so. In so far as that constitutes an intrusion into the domain of the Executive, that is an intrusion mandated by the Constitution itself".[67]

The effect of the above dicta is that what is meant by "independent" has begun to be fleshed out. An independent body is one that is outside government. An independent body is one whose members' tenures are governed by appropriate appointment and removal provisions which ensure that members are appropriately qualified, do not serve at the pleasure of the Executive and can be removed only on objective grounds relating to job performance. An independent body is one that is sufficiently well funded by Parliament to enable it to perform its functions. An independent body is one that has control over its own functions. Where the Executive makes policy or Parliament passes laws that undermine the independence of the broadcasting regulator, the courts can be approached for a ruling that this is a violation of section 192 of the Constitution.

Independent Broadcasting Regulators: International Best Practise

While South Africa is not alone in having constitutional provisions guaranteeing the independence of the authority to regulate broadcasting, it is fair to say that these provisions

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[63] Chapter 9 of the Constitution.
[64] Op Cit. Note 62 at para 27.
[65] Op Cit. Note 62 at para 31.
[66] 2002 (5) SA 721 (CC).
[67] Op Cit. Note 66 at para 99.

are not common in Constitutions. However, as the world moves increasingly into the information age, the importance of independent regulation of communications generally and broadcasting in particular, is increasingly being recognised internationally. This is important because in weighing up whether or not legislation does in fact provide for an independent authority to regulate broadcasting, our courts are likely to consider international practise in respect of the establishment of broadcasting regulators.

There are a number of examples of this trend internationally.

The Council of Europe's Committee of Ministers has adopted a recommendation to member states on the independence and functions of the regulatory authorities for the broadcasting sector[68] ("the Recommendation"). The Recommendation begins by locating the need for independent broadcasting regulation in the importance of a wide range of independent and autonomous means of communication for democratic societies. The appendix to the recommendation contains the guidelines concerning the independence and functions on the regulatory authorities for the broadcast sector. In brief these require that:

- rules governing membership of regulatory authorities are a key element of their independence and should be defined so as to protect them from any interference, in particular by political forces or economic interests[69];
- rules regarding dismissal must ensure that dismissals are not used as a means of political pressure[70];
- arrangements for funding of regulatory authorities be specified in law in accordance with a clearly defined plan, with reference to the estimated cost of the regulatory authorities' activities, so as to allow them to carry out their functions fully and independently[71]. In this regard the guidelines are provide that public authorities should not their financial decision-making power to interfere with the independence of regulatory authorities[72];
- regulatory authorities should have the power to adopt regulations and guidelines concerning broadcasting activities and to adopt internal rules, subject to clearly defined delegation by the legislator[73];
- one of the essential tasks of regulatory authorities in the broadcasting sector is normally the granting of licences[74];
- regulatory authorities should be accountable to the public for their activities and should publish regular or ad hoc reports relevant to their work[75];

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[68] Rec (2000) 23. See: http://cm.coe.int/ta/rec/200/200r23.htm
[69] Clause II. 3. of the Appendix to the Recommendation.
[70] Clause II. 6. of the Appendix to the Recommendation.
[71] Clause III. 9. of the Appendix to the Recommendation.
[72] Clause III. 10. of the Appendix to the Recommendation.
[73] Clause IV. 12. of the Appendix to the Recommendation.
[74] Clause IV. 13. of the Appendix to the Recommendation.
[75] Clause V. 25. of the Appendix to the Recommendation.

- in order to protect the regulatory authorities' independence, it is necessary that they should be supervised only in respect of the lawfulness of their activities and the correctness and transparency of their financial activities[76].

More importantly for South Africa, the Continent of Africa has begun to make commitments regarding the importance of independent media regulation. In 2001, a number of participants in a UN/UNESCO conference on the broadcast media developed the Windhoek Charter on Broadcasting in Africa. In respect of regulatory independence, the following is a key provision of the Windhoek Charter: "All formal powers in the areas of broadcast and telecommunications regulation should be exercised by public authorities which are protected against interference, particularly of a political or economic nature, by, among others, an appointments process for members which is open, transparent, involves the participation of civil society and is not controlled by any particular political party."[77]

In 2002 the African Commission on Human and Peoples' Rights, which was established originally under the auspices of the Organisation for African Unity to promote human and peoples' rights and to ensure their protection in Africa, passed a Resolution on the Adoption of the Declaration of Principles of Freedom of Expression in Africa[78]. Clause VII thereof deals with Regulatory Bodies for Broadcasting and Telecommunications and sets out the following key principles:

- broadcasting and telecommunications must be regulated by a public authority which is independent and protected against interference, particularly of a political or economic nature;
- the appointment process in respect of such a body shall be open and transparent with participation by civil society and it shall not be controlled by any particular political party;
- such a body must be accountable to the public through a multi-party body.

The Independent Communications Authority of South Africa:

Since 2000, the piece of national legislation that establishes an independent authority to regulate broadcasting has been the Independent Communications Authority South Africa Act[79]. Section 3 of the ICASA Act establishes the Independent Communications Authority of South Africa ("ICASA").

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[76] Clause V. 26. of the Appendix to the Recommendation.
[77] Clause 2 of the Windhoek Declaration. Available at: www.article19.org/docimages/1019.htm
[78] http://www.achpr.org/english/_doc_target/documentation.html?../resolutions/resolution67_en.html Accessed 24 May 2005.
[79] Act 13 of 2000.

ICASA's mandate is to regulate both broadcasting and telecommunications in the public interest[80]. In so doing, ICASA is required to perform the duties and exercise the powers that had been given to the previous regulators of broadcasting and telecommunications, respectively, namely the IBA[81] and the South African Telecommunications Regulatory Authority ("SATRA"). These duties and powers are found in three separate pieces of legislation, namely, the Telecommunications Act[82] ("the Telecommunications Act"), the IBA Act and the Broadcasting Act[83] ("the Broadcasting Act") (collectively the "underlying statutes").

As has been set out above, one of the key issues regarding independence is the appointment/removal of the members of the regulatory authority. Section 5 read with section 3(2) of the ICASA Act provides that ICASA acts through a Council of seven members, including the Chairperson, all of whom are appointed by the President on the recommendation of the National Assembly in accordance with the following principles[84]:

- public participation in the public nomination process
- transparency and openness
- publication of a shortlist of candidates who must meet required criteria and who are not subject to disqualification.

The criteria for appointment include a commitment to fairness, freedom of expression, openness and accountability on the part of those entrusted with the governance of a public service[85]. There are also collective criteria, that is, when viewed collectively, the councillors of ICASA must be representative of a broad cross-section of the of the population of the Republic[86] and must possess suitable qualifications, expertise and experience of, amongst others, broadcasting and telecommunications policy, engineering, technology, frequency band planning, law, marketing, journalism, entertainment, education, economics, business practise and finance or any other related expertise and qualifications[87].

Section 6 of the ICASA Act provides for the disqualification of an ICASA Councillor if he or she: is not a citizen; is not permanently resident in the Republic; is a public servant or the holder of any other remunerated position under the State; is a member of Parliament, or of any provincial legislature or municipal council; is an office-bearer or employee of any party, movement or organisation of a party political nature; (or his or her family member) has a direct or indirect financial interest in the telecommunications or broadcasting industry; (or his

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[80] Section 2(a) and (b) of the ICASA Act.
[81] Section 4(1)(a) and (b) of the ICASA Act.
[82] Act 103 of 1996.
[83] Act 4 of 1999.
[84] Section 5(1) of the ICASA Act.
[85] Section 5(3)(a) of the ICASA Act.
[86] Section 5(3)(b)(i) of the ICASA Act.
[87] Section 5(3)(b)(ii) of the ICASA Act.